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CIVIL PROCEDURE

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JURISDICTION IN PERSONAM

By Act No. 418 of 1987, the Louisiana Legislature amended section 3201 of Title 13 of the Louisiana Revised Statutes, the Louisiana Long-Arm Statute.[1] Section (A) of that statute continues to list eight specific activities which, if performed by a nonresident, would enable a Louisiana court to exercise personal jurisdiction. However, a section (B) has been added providing that:

> In addition to the provisions of Subsection A, a court of this state may exercise personal jurisdiction over a nonresident on any basis consistent with the constitution of this state and of the Constitution of the United States.[2]

The comments to the 1987 amendment explain that its purpose is to ensure that the Long-Arm Statute is applied so that personal jurisdiction is not limited to the specific examples in section 3201 but extends to the constitutional limits of due process. Now it is clear that any exercise of personal jurisdiction over a nonresident by a Louisiana court must only be consistent with the United States and Louisiana constitutions.

In *McBead Drilling Co. v. Kremco, Ltd.*,[3] the Louisiana Supreme Court recently discussed the constitutional due process standards of personal jurisdiction as they relate to a nonresident manufacturer. One of the defendants in *McBead*, Dickirson Corporation, was the nonresident manufacturer as well as the seller of a drilling rig to the plaintiff. The plaintiff alleged damage in Louisiana when the rig collapsed as a result of design and structural defects attributable to Dickirson. Dickirson filed an exception of lack of personal jurisdiction, asserting its nonresident status.

Despite the fact that Dickirson had not regularly made or solicited any sales to Louisiana residents (including the plaintiff), the supreme court felt that Dickirson was subject to Louisiana jurisdiction as a

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1. La. R.S. 13:3201 (Supp. 1987).
2. 1987 La. Acts No. 418, (to be codified at La. R.S. 13:3201(B)).
3. 509 So. 2d 429 (La. 1987).

nonresident manufacturer fitting squarely under subsection (8) of the Long-Arm Statute.[4]

Having found that the facts of the case satisfied subsection (8), the court then considered whether the exercise of personal jurisdiction over Dickirson met the standards of constitutional due process. Now that the Long-Arm Statute has been amended by the addition of section (B) to Louisiana Revised Statutes 13:3201, this second, constitutional analysis by the *McBead* court would be the only analysis required in a case being considered today.

Dickirson relied on the United States Supreme Court's decision in *World-Wide Volkswagen Corp. v. Woodson*.[5] The plaintiffs in *World-Wide* argued that a state may exercise jurisdiction over the seller of a product as long as it is foreseeable from the design and purpose of that product that it might cause injury in such state. To this argument, the *World-Wide* court responded:

> [T]he foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.[6]

Thus, Dickirson asserted that, because its contacts with Louisiana were so minimal, it should not have reasonably anticipated that it would be "haled into court" in Louisiana.

The Louisiana Supreme Court disagreed, drawing a distinction between the contacts of a seller and those of a manufacturer with a forum state:

> In *World-Wide Volkswagen*, jurisdiction over the manufacturer was not at issue. On the other hand, jurisdiction over the manufacturer is the only issue in the present case. In litigation arising from a product-related injury in the forum state, there are significant differences between the exercise of jurisdiction over a retailer who simply sold the product locally and the

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4. A court may exercise personal jurisdiction over a nonresident, who acts directly or by an agent, as to a cause of action arising from any one of the following activities performed by the nonresident:

* * *

(8) Manufacturing of a product or component thereof which caused damage or injury in this state, if at the time of placing the product into the stream of commerce, the manufacturer could have foreseen, realized, expected, or anticipated that the product may eventually be found in this state by reason of its nature and the manufacturer's marketing practices.

La. R.S. 13:3201 (Supp. 1987).

5. 444 U.S. 286, 100 S. Ct. 559 (1980).

6. Id. at 297, 100 S. Ct. at 567.

> exercise of jurisdiction over a manufacturer whose products were sold over a large area . . . .
>
> Consideration of the relationship among the defendant, the forum, and the litigation could lead one to reasonably conclude that it is basically unfair to hold a local retail dealer subject to personal jurisdiction in a remote state on a product liability claim relating to design or manufacturing defects. But one could also reasonably conclude on the same considerations that fairness and substantial justice do not preclude subjecting the manufacturer to jurisdiction wherever the product causes damages because of design or manufacturing defects.[7]

While the *McBead* court was correct in not applying the holding in *World-Wide* to a manufacturer, *McBead* should not be construed to mean that manufacturers will be per se subject to personal jurisdiction in Louisiana if their product causes damage there. Such a reading is too broad.[8]

PRESCRIPTION AND AMENDED PLEADINGS

Traditionally, Louisiana courts have applied the general rule that the filing of a petition interrupts prescription only as to parties named in the suit on a timely basis absent a solidary relationship between a timely named party and an unnamed party.[9] Attempts have been made to overcome this rule by adding new parties through amended pleadings filed pursuant to Louisiana Code of Civil Procedure article 1153, which provides that:

> When the action or defense asserted in the amended petition or answer arises out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of filing the original pleading.[10]

However, out of concern that the policy underlying prescription would be undermined, the courts have been reluctant to permit amended

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7. *McBead*, 509 So. 2d at 432.

8. Cf. Asahi Metal Industry Co. v. Superior Court of California, Solano County, 107 S. Ct. 1026, 1033-34 (1987) (indicating that the determination of the reasonableness of the exercise of jurisdiction in every case will depend upon an evaluation of several factors).

9. La. Civ. Code art. 1793 provides that suit by a solidary obligee interrupts prescription for other solidary obligees; La. Civ. Code art. 3503 provides that when prescription is interrupted against one solidary obligor, it is interrupted against all solidary obligors.

10. La. Code Civ. P. art. 1153.

pleadings adding claims by or against new parties to relate back where new and separate causes of action were being added.[11]

While this policy added simplicity to application of principles of prescription, it was felt to be harsh and inequitable in some situations. Recently, in *Ray v. Alexandria Mall*,[12] and *Giroir v. South Louisiana Medical Center*,[13] the Louisiana Supreme Court has favored a more flexible application of article 1153, permitting a party, under certain circumstances, by an amended petition relating back to the filing of the original petition, to either change the identity or capacity of a party or even add an altogether new party after prescription has run.

In *Ray*, the plaintiff was injured in a shopping center named "Alexandria Mall." Intending to sue the owner of the shopping center, plaintiff filed a timely suit against the "Alexandria Mall," alleging it to be a Louisiana corporation. Service was made within the prescriptive period on the manager of the building, which actually was owned by a partnership named "Alexandria Mall Company." The supreme court held that an amendment by the plaintiff after the expiration of the prescriptive period to correct the allegation as to the identity of the owner of the building related back to the filing of the original petition.

The court based its justification for this new rule on the fact that the substituted defendant was not prejudiced in defending the lawsuit, because it had received notice of the suit within the prescriptive period through service on the substituted defendant's manager, combined with the facts that the claim alleged in the amended petition arose out of the same transaction and occurrence pleaded in the original petition and that the plaintiff's mistake concerning the identity of the proper defendant was understandable (the owner was always the intended defendant). Finally, the court indicated that its holding was not intended to apply to an amendment joining a new and unrelated defendant "since this would be tantamount to assertion of a new cause of action."[14]

Subsequently, in *Giroir*, the Louisiana Supreme Court utilized the criteria in *Ray* to decide when the claims of new plaintiffs, joined by an amended petition after prescription had expired, related back to the date of the filing of the original petition by another plaintiff.

In *Giroir*, plaintiff timely asserted against a hospital and several doctors his own action for the wrongful death of his wife and his wife's survival action as the administrator of her estate. After the prescriptive

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11. Guidry v. Theriot, 377 So. 2d 319 (La. 1979); Majesty v. Comet-Mercury-Ford Co., 296 So. 2d 271 (La. 1974). The *Guidry* holding on prescription was repudiated by the Louisiana Supreme Court in Louriere v. Shell Oil Co., 440 So. 2d 92, 97 (La. 1983). 2d 92, 97 (La. 1983).

12. 434 So. 2d 1083 (La. 1983).

13. 475 So. 2d 1040 (La. 1985).

14. *Ray*, 434 So. 2d at 1086.

period had run, plaintiff amended his petition against the defendants to change his capacity from that of administrator of his wife's estate to his individual capacity, and to add the wrongful death and survival claims of his two children as plaintiffs.

Even though the children's wrongful death and survival actions were considered separate and distinct causes of actions from that of the plaintiff, the court found that the timely suit of the father gave sufficient notice to the defendant of the potential claims of his children to justify the relation back of such claims.

The court based its decision on the facts that the claims of the plaintiff and his children arose out of the alleged negligent medical care to the deceased by the defendants and that the children were among the "nucleus" of the plaintiff's family and not "wholly new or unrelated to their father with respect to actions based on the death of their mother."[15] The majority emphasized that the defendant was not prejudiced by the amendment because the plaintiff's properly filed suit and the hospital's records mentioning the children placed the defendant on timely notice of the potential claims of the new parties, and thus the defendant could have foreseen a "reasonable possibility" that the children would be filing a claim.

Subsequent Louisiana cases have been inconsistent in applying the rationale of *Ray* and *Giroir* to cases where attempts were made to add claims of new parties by amendment.

In *Pontiff v. Bailey*,[16] Mr. & Mrs. Pontiff filed suit against Joy Bailey, her insurer (Casualty), and others, within the prescriptive period, for damages arising out of an automobile collision. Joy Bailey and Casualty filed a timely reconventional demand against the Pontiffs in that proceeding. Within the prescriptive period Joy Bailey filed, on behalf of her minor daughter Theresa (who was a passenger with Joy Bailey), a separate suit against the Pontiffs and their insurer. After prescription had run, Theresa Bailey amended her suit to add Casualty as a defendant. Casualty filed an exception of prescription to the amended petition of Theresa Bailey, arguing that it had not been sued or given any other formal notice within the prescriptive period by any member of the Bailey family of a claim against Casualty arising out of the automobile accident. The court of appeal, however, citing *Ray* and *Giroir*, held that Theresa Bailey's amended petition naming Casualty as a new defendant related back to the filing of her original petition. Finding that Casualty had been sued by the Pontiffs within the prescriptive period in a separate lawsuit and that it was not "unaware of

15. *Giroir*, 475 So. 2d at 1045.
16. 509 So. 2d 451 (La. App. 3d Cir. 1987).

the circumstances surrounding this accident,"[17] the court concluded that Casualty had been given adequate notice of Theresa Bailey's potential claims arising out of the same accident such that it was not prejudiced by being joined after the prescriptive period in a related lawsuit. In effect, the *Pontiff* court permitted an amendment adding an entirely new cause of action against a *new* defendant in Theresa Bailey's suit when there were no facts indicating either mistaken identity or actual notice to the defendant within the prescriptive period.

More restrictive interpretations of *Ray* and *Giroir* occurred in *Ducre v. Mine Safety Appliances Co.*[18] and *Poirier v. Browning Ferris Ind.*[19] In *Ducre*, the plaintiff filed a timely suit before his death from silicosis. More than one year following his death an amended petition was filed adding his widow and children as new parties asserting their wrongful death actions and substituting themselves for the deceased plaintiff.

The court held that an amendment was permissible to substitute the wife and children to continue the deceased's action. However, it ruled that the wrongful death actions of the new parties would not relate back. The court, after reviewing the jurisprudence, decided that the wrongful death actions of the new plaintiffs were different causes of action from the survival action of the deceased and had to be filed on a timely basis. The new plaintiffs argued that under *Giroir* the defendant was not prejudiced by the amendment asserting the wrongful death claim because the defendant had been put on notice of the new plaintiffs' potential wrongful death claims by its knowledge of the death of their father. The court, however, correctly distinguished *Giroir* by pointing out that in *Giroir* the court permitted the relation back of the wrongful death claim of the deceased's children because their father had already asserted a wrongful death claim against the defendants within the prescriptive period. In *Ducre*, no member of the deceased plaintiff's family had asserted a wrongful death claim within the prescriptive period.[20] The court flatly rejected the plaintiff's interpretation of *Giroir* that the defendant's mere knowledge of the plaintiff's death gave sufficient notice of the potential wrongful death claims of the new parties to justify a relation back of the amended petition.

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17. Id. at 454.

18. 634 F. Supp 696 (E.D. La. 1986).

19. No. 86-955, slip op. (La. App. 3d Cir. Oct. 7, 1987).

20. The court cited with approval Revere v. Risley, 470 So. 2d 281 (La. App. 5th Cir. 1985). In *Revere*, the court of appeal upheld a prescription defense against the driver of a car who intervened (after prescription had run) in the timely suit against the alleged tortfeasor of the driver's passengers. Despite the fact that the defendants may have had timely knowledge that the intervenor suffered injury in the accident, the intervenor's claim "spelled out a different cause of action" from the passengers and therefore had to be filed within the prescriptive period.

A similar interpretation of *Giroir* occurred in *Poirier*, where a wife asserting a post-prescription claim for loss of consortium sought to be added as a new plaintiff by an amendment to her husband's timely suit for personal injury. Despite the family relationship with the plaintiff, and the fact that the amended claim arose out of the same incident alleged in the petition, the court of appeal upheld the defendant's defense of prescription to the amended petition. It found that the wife's claim for loss of consortium was a separate cause of action from her husband's claim for his injuries and had to be asserted on a timely basis. Furthermore, it found that the notice criteria of *Giroir* was not met because there was no actual communication of either the original plaintiff's marital status or the wife's potential claim to the defendant within the prescriptive period. The court held: "We do not believe that a defendant must remain alert indefinitely to the possibility that a plaintiff *might* have a spouse or children, or both, who *might* at some future date bring a claim."[21]

In *Randall v. Feducia*,[22] the Louisiana Supreme Court had an opportunity to clarify the *Ray* and *Giroir* holdings, but chose not to do so. There, plaintiff sustained an injury when she stumbled at a drop-off which was created where a public sidewalk had been constructed by the City of Shreveport (City) adjacent to a walkway on her lessor's property.

Plaintiff sued the lessor within the one year prescriptive period and the lessor filed a third party demand for indemnity against the City over one year after the accident, but within the additional ninety day period provided by Louisiana Code of Civil Procedure article 1067 for the filing of incidental demands. After the expiration of the ninety day period, plaintiff amended her suit by naming the City as a defendant and alleging solidary liability with the lessor for her damages. After trial, the lessor was absolved of liability, and, there being no basis for solidarity between the City and the lessor, the City was dismissed on the basis of prescription.

Plaintiff, however, argued that the third party demand filed by the lessor within the additional ninety day period provided by article 1067 served to provide the City with sufficient *notice* of plaintiff's potential claim and therefore that the City was not prejudiced by plaintiff's amended petition filed after prescription had run.

The majority opinion, without discussing its rulings in *Ray* or *Giroir*, held that article 1067 provides an extension of prescription for the benefit of parties filing incidental demands and was not intended to benefit a plaintiff by "resuscitating" an otherwise prescribed claim. The court

21. No. 86-955, slip op. (La. App. 3d Cir. Oct. 7, 1987).
22. 507 So. 2d 1237 (La. 1987).

stated the rule to be that the filing of a third party demand interrupts prescription in favor of the plaintiff only when both the original and third party demands are filed within the prescriptive period.[23]

In his dissenting opinion, Justice Lemmon faulted the majority for not permitting plaintiff's amendment against the third party defendant to relate back pursuant to Louisiana Code of Civil Procedure article 1153. Justice Lemmon considered that the *Ray* and *Giroir* criteria for applying article 1153 were met because the plaintiff's claim asserted against the City had arisen out of the same occurrence alleged in the original petition, the city had received, through a third party demand, timely notice of plaintiff's claim, and the City was not a wholly new or unrelated party.

If the focal issue in *Ray* and *Giroir* is whether the defendant received timely notice of the amended claim sufficient to eliminate prejudice in defending against it, then Justice Lemmon's point is well taken. Article 1114 of the Code of Civil Procedure requires that a certified copy of the plaintiff's petition be served with the third party demand. Since article 1067 requires a third party defendant to defend against a third party demand filed within the ninety day period following the running of prescription, it is arguable that the third party defendant is not prejudiced by also defending against the plaintiff's claim in the same lawsuit.

SUMMARY JUDGMENT

In *Celotex Corp. v. Catrett*,[24] the United States Supreme Court considered the burden of proof on a party asserting a motion for summary judgment under Federal Rule of Civil Procedure 56. Since Louisiana Code of Civil Procedure articles 966 and 967, which govern a motion for summary judgment, essentially track Federal Rule 56, the *Celotex* decision may affect how Louisiana courts consider such motions.

In *Celotex*, the plaintiff alleged that her husband's wrongful death was caused by his exposure to asbestos products manufactured or distributed by the defendants. One of the defendants, Celotex, moved for summary judgment, asserting that during discovery the plaintiff had failed to produce any evidence to support the allegation that the decedent had been exposed to Celotex's products. Although the district court granted the motion for summary judgment, the court of appeals reversed,[25] holding that Celotex's failure to support its motion with evi-

23. The court overruled State Farm Mutual Automobile Ins. Co. v. Farnsworth, 425 So. 2d 827 (La. App. 5th Cir. 1982), writ denied, 433 So. 2d 150 (1983), which was a contrary holding on similar facts.

24. 106 S. Ct. 2548 (1986).

25. Catrett v. Johns-Manville Sales Corp., 756 F.2d 181 (D.C. Cir. 1985).

dence tending to *negate* such exposure precluded summary judgment in its favor.

Reversing the court of appeals, the United States Supreme Court ruled:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing of an essential element of her case with respect to which she has the burden of proof.[26]

Federal Rule 56 is the source of Louisiana Code of Civil Procedure articles 966 and 967.[27] Thus, Louisiana courts look to federal court interpretations of Rule 56 for guidance in construing articles 966 and 967.[28] The effect of the *Celotex* decision in Louisiana, therefore, may be to switch the initial burden of proof in a motion for summary judgment from the moving to the nonmoving party, at least in those cases where the nonmoving party will bear the burden of proof on a dispositive issue at the trial of the main action.[29]

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26. 106 S. Ct. at 2552-53.

27. See the comments to La. Code Civ. P. arts. 966-967.

28. The proceeding authorized in Louisiana Code of Civil Procedure, article 966 et seq. concerning summary judgments, is an innovation in our practice, and there is virtually no jurisprudence from the courts of this state relating to it. However, it was adopted with only minor, immaterial variations from Rule 56 of the Federal Rules of Practice; consequently, we are justified in considering the jurisprudence of the federal appellate courts pertaining to its proper application.

Kay v. Carter, 243 La. 1095, 1102, 150 So. 2d 27, 29 (1963).

29. *Celotex*, 106 S. Ct. at 2553:

> In cases like the instant one, where the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the "pleadings, depositions, answers to interrogatories, and admissions on file." Such a motion, whether or not accompanied by affidavits, will be "made and supported as provided in this rule," and Rule 56(e) therefore requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the "depositions, answers to interrogatories, and admissions on file," designate "specific facts showing that there is a genuine issue for trial."

The Louisiana rule concerning the burden of proof in a motion for summary judgment was most recently stated in *Sanders v. Hercules Sheet Metal, Inc.*:[30] On a motion for summary judgment the court must first

> determine whether the supporting documents presented by the moving party are sufficient to resolve all material fact issues. If they are not sufficient, summary judgment must be denied. Only if they are sufficient does the burden shift to the opposing party to present evidence showing that material facts are still at issue; only at this point may he no longer rest on the allegations and denials contained in his pleadings.[31]

The Louisiana Supreme Court stated this rule after noting that Louisiana Code of Civil Procedure articles 966 and 967 were drafted to accord with Federal Rule of Civil Procedure 56. Thus, a Louisiana court would, after *Celotex*, be justified in altering the *Sanders* rule.

Should Louisiana courts follow the *Celotex* decision? If they do, the result would appear to be consistent with the goal of curtailing frivolous or unsupportable claims. As the *Celotex* court noted:

> Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just, speedy and inexpensive determination of every action." . . . Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.[32]

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30. 385 So. 2d 772 (La. 1980).

31. 385 So. 2d at 775. Recent cases applying the quoted rule are Dement v. Red River Valley Bank, 506 So. 2d 1329, 1331 (La. App. 2d Cir. 1987); Hall v. Babin, 506 So. 2d 658, 660-61 (La. App. 4th Cir. 1987); ERA Enterprises, Inc. v. Gulf Oil Corp., 506 So. 2d 160, 161 (La. App. 4th Cir. 1987); St. Cyr v. Catherine's Stout Shoppe, 505 So. 2d 741, 742-43 (La. App. 4th Cir. 1987); Daret v. Halmar Const. Co., 505 So. 2d 69, 71 (La. App. 4th Cir. 1987); Stuart v. City of Morgan City, 504 So. 2d 934, 937 (La. App. 1st Cir. 1987); Mims v. Bradford, 503 So. 2d 1083, 1084 (La. App. 2d Cir.), writ denied, 504 So. 2d 556 (1987); Barham & Churchill v. Campbell & Assocs., 503 So. 2d 576, 578-79 (La. App. 4th Cir.), writ denied, 503 So. 2d 1018 (1987); University Properties Corp. v. Fidelity National Bank, 500 So. 2d 888, 908 (La. App. 1st Cir. 1986), writ denied, 501 So. 2d 762 (1987); Cannon v. Insured Lloyds, 499 So. 2d 978, 981-82 (La. App. 3rd Cir. 1986); Cockerham v. Winn Parish Police Jury, 494 So. 2d 1306, 1308-09 (La. App. 2d Cir. 1986); Callahan v. Foster Wheeler Energy Corp., 494 So. 2d 568, 570-71 (La. App. 3rd Cir. 1986).

32. 106 S. Ct. at 2555.

If Louisiana courts adopt the policy and rule of *Celotex*, the likely result will be to streamline litigation without infringing on the rights of parties.[33]

FRAGMENTARY JUDGMENTS

Louisiana courts have traditionally applied the principle that a lawsuit should be disposed of as a single unit by one final judgment. Fragmenting cases with multiple final judgments gives rise to inefficient, piecemeal appeals and creates a risk of inconsistent final judgments in the same case.[34] However, with the increase in costly and lengthy multi-party litigation and the liberalization of rules permitting joinder of diverse (and even unrelated) claims,[35] it has been considered inequitable in some instances for parties with claims and defenses clearly separable from the others in the case to await a ruling until the entry of one final judgment after a trial on the merits.

To strike a balance between the single unit rule and the need for separate judgments in multi-party litigation, the Louisiana Code of Civil Procedure in articles 1915 and 1971 gives the trial court limited authority to enter partial final judgments both before and after trial on the merits.

Article 1915(3) specifies the granting of summary judgment as a permissible partial final judgment before the trial on the merits. Insurance companies have attempted to utilize motions for summary judgment pursuant to article 1915(3) to obtain a partial final judgment on coverage defenses at an early point in the proceedings. Where the insurer's motion for summary judgment on the issue of coverage is granted, it is clear that under article 1915 a proper partial final judgment results because the insurer is dismissed. But where the insurer's motion for summary judgment is denied it is equally clear that only an unappealable interlocutory ruling results.[36]

In *Smith v. Hanover Ins. Co.*,[37] both the plaintiff and the insurer-defendant believed there was no fact issue to be resolved and desired

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33. In *Celotex*, a year of discovery had taken place. The Court noted:
> The parties had conducted discovery, and no serious claim can be made that respondent was in any sense "railroaded" by a premature motion for summary judgment. Any potential problem with such premature motions can be adequately dealt with under Rule 56(f), which allows a summary judgment motion to be denied, or the hearing on the motion to be continued, if the nonmoving party has not had an opportunity to make full discovery.

106 S. Ct. at 2554-55.

34. McDonald v. Book, 215 So. 2d 394 (La. App. 3d Cir. 1968); Jeansonne v. Willie, 188 So. 2d 170 (La. App. 4th Cir. 1966).

35. La. Code Civ. P. arts. 463-464, 1061.

36. La. Code Civ. P. art. 968.

37. 363 So. 2d 719 (La. App. 2d Cir. 1978).

an early final judgment on the coverage issue. Cross motions for summary judgment were filed on the theory that in ruling on the coverage issue the trial court would *have* to grant one of the two motions and thus an appealable final judgment would result under article 1915(3). The court of appeal, however, found that a partial judgment granting a summary judgment upholding coverage in favor of the plaintiff was unauthorized. The court said that in order for a plaintiff asserting a claim for a money judgment to assert a proper motion for summary judgment pursuant to Louisiana Code of Civil Procedure article 966, he had to request judgment "for all or part of the relief for which he has prayed." The court pointed out that in a case where a money judgment was requested, a ruling on coverage only decided one legal issue and granted none of the "relief" claimed by the plaintiff.

In 1983, article 1915 was amended by the addition of section 5 which authorizes entry of separate final judgments on the liability and damage issues when they are tried separately. In *Strauss v. Rivers*,[38] both the plaintiff and the insurer-defendant sought an early final judgment on the coverage issue. The trial court agreed to separately try the coverage issue pursuant to article 1915(5). After separate trial, the trial court entered what purported to be a partial final judgment in favor of the plaintiff upholding coverage, and the insurer appealed.

The court of appeal, citing its long-standing policy against piecemeal appeals, dismissed the appeal finding that no appealable partial final judgment had been rendered. It reasoned that a determination of coverage alone did not amount to a final judgment on "liability" as contemplated by article 1915(5); a finding of coverage only determined the legal issue of whether a policy was "in effect" and not the ultimate liability of the insurer.

The court was correct. In order for there to be an adjudication of the "liability" of an insurer, the liability of the insured would have to be determined also.

Despite the holdings in *Smith* and *Strauss*, appellate review of a trial court's interlocutory ruling upholding insurance coverage, whether raised through a motion for summary judgment or separate trial, may be attempted through a supervisory writ. In *Keiffer v. Whitaker*,[39] the court of appeal granted the supervisory writ application of an insurer whose motion for summary judgment on coverage had been denied. The court, after stating that the ruling was unappealable, said that it was granting the writ to consider the denial of the insurer's summary judgment because there was clearly no factual dispute and "judicial efficiency and fundamental fairness to the litigants dictate that the merits of the

38. 501 So. 2d 876 (La. App. 5th Cir. 1987).
39. 468 So. 2d 587 (La. App. 4th Cir. 1985).

application for supervisory writs be decided to avoid the waste of time and expense of a possibly useless future trial on the merits as it affects this defendent."[40]

An additional article which has provided the trial court flexibility in entering partial final judgments is Louisiana Code of Civil Procedure article 1971 which authorizes the trial court to conduct a partial new trial as to any party or part of the issues. To avoid the inequity in certain cases of delaying the finality of the entire judgment while a possibly lengthy partial new trial is conducted, article 1971 provides that the granting of a new trial only suspends the finality of the entire judgment if the trial judge so orders. Though this rule was intended to give flexibility to the trial court in managing the lawsuit, it created a trap for unwary parties to the judgment who permit appellate delays to run believing that the granting of a partial new trial renders the entire judgment interlocutory. Louisiana practitioners may have become confused with the federal new trial procedure provided in Federal Rule of Civil Procedure 59. That rule is similar to article 1971 in that partial new trials are authorized, but, unlike Louisiana procedure, the granting of a new trial in federal court renders "nonfinal the disposition of all issues between the parties."[41]

Noting this problem, the Louisiana Supreme Court in *Thurman v. Star Electric Supply, Inc.*[42] found a literal application of article 1971 to be unworkable.[43] It attempted to simplify the rule by devising an interpretation by which the finality of the portion of the judgment not subjected to the new trial would be based on the "severability" of the retried issues rather than by compliance with the technical necessity for entry of an order by the trial judge holding the case in abeyance. However, because of conceptual difficulties in determining the severability of issues involved in the new trial, the *Thurman* rule did not fully eliminate problems in the application of article 1971.[44]

Hoping to simplify new trial procedure, the Louisiana Legislature, by Act No. 695 of 1987, amended Louisiana Code of Civil Procedure articles 2087 and 2123 (which provide the delay periods for devolutive and suspensive appeals) by adding to each article a section specifying that: "When one or more parties file post-judgment motions, the

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40. Id. at 588.

41. Washington v. Confederated Tribes, 447 U.S. 134, 150, 100 S. Ct. 2069, 2079 (1980).

42. 283 So. 2d 212 (La. 1983).

43. "This implication of the literal provisions of C.C.P. 1971 is simply not workable—another example of the injury suffered by the practice and procedure of this state when provisions of the federal rules are wedged into the Code of Civil Procedure." Id. at 217.

44. See Bantin v. State, 411 So. 2d 63 (La. App. 3rd Cir. 1981); L'Enfant, Developments in the Law, 1981-1982 — Procedure, 43 La. L. Rev. 491, 500 (1982).

delay periods specified herein shall commence for all parties at the time they commence for the party whose post-judgment motion is last to be acted upon by the trial court."

While this amendment adds needed certainty to appellate procedures, it creates an unnecessarily inflexible rule in that it appears to remove *all* discretion from the trial court in determining whether that part of the judgment not being retried should become final. The procedure for partial new trials would have been more workable had the new rule provided that the filing of a post-trial motion holds the entire case in abeyance subject to the authority of the trial judge to issue an order in certain cases where there exists severability of the issues.

ATTORNEY'S FEES

The Louisiana Supreme Court has again stated that neither legislation nor contractual stipulations may impair the courts' authority to inquire into the reasonableness of attorney's fees. In *Central Progressive Bank v. Bradley*,[45] the Louisiana Supreme Court decided that, despite language in Louisiana Civil Code article 2000, "the prohibition against a lawyer accepting a 'clearly excessive fee' found in Disciplinary Rule 2-106 of the Code of Professional Responsibility, [sic] cannot be abrogated by a provision in a note fixing the amount of attorney fees as a percentage of the amount to be collected."[46]

Similarly, in *City of Baton Rouge v. Stauffer Chemical Co.*,[47] the Louisiana Supreme Court held, "The prohibition against a lawyer accepting a 'clearly excessive fee' cannot be abrogated by a law fixing the amount of attorney fees as a percentage of the amount to be collected. Despite such a law, the courts may inquire into the reasonableness of such a fee."[48] *Stauffer Chemical* involved Louisiana Revised Statutes 47:1512 which contains a ten-percent attorney's fees provision.

In both *Bradley* and *Stauffer Chemical*, the Louisiana Supreme Court relied on Disciplinary Rule 2-106, which provides guidelines for a lawyer in his assessment of a fee, and on Louisiana Constitution article V, section 5(B), which grants to the supreme court exclusive original jurisdiction of disciplinary proceedings against a member of the bar. Thus, if some specific amount, based upon a percentage stated in a note or in a statute, is to be automatically allowed as attorney's fees without judicial review, Disciplinary Rule 2-106 and Louisiana Constitution article V, section 5(B) must be amended. That may not be desirable. After

45. 502 So. 2d 1017 (La. 1987).
46. Id.
47. 500 So. 2d 397 (La. 1987).
48. Id at 401.

all, why should a fee be in any amount greater than what is reasonable?

ARBITRATION

Arbitration is growing in popularity because it typically provides a more rapid, less formal, and less expensive means of resolving disputes than a judicial forum. However, when parties agree to arbitration, they are presumed to accept the risk that arbitrators are fallible and may make procedural and substantive mistakes of either fact or law, which can be submitted for judicial review only on very restricted grounds.[49]

The Louisiana Arbitration Statute embodies this policy.[50] It provides that a party may apply for judicial confirmation of an arbitration award and the court "shall" confirm the award unless it is vacated, modified, or corrected under the specific grounds specified in the statute.[51] Aside from partiality, fraud, and corruption, the statute authorizes a court to vacate an arbitration award on the basis of procedural and evidentiary deficiencies in the proceedings where they result from "misbehavior" by the arbitrator.[52] Judicial modification of the substantive content of arbitration awards is likewise severely restricted to correct (i) material miscalculation in figures, or some other mistake in the description of the person, thing, or property subject to award, or (ii) an arbitrator's award which has gone beyond the scope of the matter submitted.[53] Recent cases indicate that Louisiana courts intend to vigorously enforce these restrictions on judicial review while maintaining some flexibility for making necessary exceptions.

In *St. Tammany Manor v. Spartan Building Corp.*,[54] after a construction contract dispute was submitted to arbitration, an award to one of the parties included interest calculated from the date of substantial completion of the contract. The aggrieved party, believing that the arbitrator had erred in not awarding interest from the date of the arbitrator's award, filed suit for judicial modification of the award on the basis of "material miscalculation in figures."

The supreme court ruled that such an alleged error was not a "miscalculation in figures" but was instead a challenge to the arbitrator's decision on the merits of the controversy. The court refused to substitute "'its conclusion for that of the arbitrator,'"[55] emphasizing that judicial

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49. Firmin v. Garber, 353 So. 2d 975 (La. 1977).
50. La. R.S. 9:4201-4217 (1983).
51. La. R.S. 9:4209 (1983).
52. La. R.S. 9:4210 (1983).
53. La. R.S. 9:4211 (1983). Those restrictions are similar to those set forth in 9 U.S.C. § 11 (1982).
54. 509 So. 2d 424 (La. 1987).
55. Id. at 426, quoting *Firmin*, 353 So. 2d at 977.

authority to review arbitration awards should be strictly confined to the grounds specified in the Louisiana Arbitration Statute even where error appeared.

In *I.D.C. Inc. v Natchitoches Dev. Co.*,[56] a land owner and his contractor submitted to arbitration their dispute over the contractor's claim for the unpaid contract price. The arbitration panel ruled in favor of the contractor, and when the contractor sought judicial confirmation of the award the owner filed objections based on alleged substantive errors by the arbitrator. After the trial court summarily confirmed the arbitration award, the owner appealed. The court of appeal refused to even address the merits of the matter, finding instead that it was so well settled in Louisiana that courts would not review the type of merits-related issues raised by the owner that the appeal was frivolous. Accordingly, the court awarded attorney's fees to the contractor. This appears to be the first reported Louisiana appellate case in which sanctions were imposed for a groundless objection to confirmation of an arbitration award. In view of the increasing number of such unwarranted judicial challenges, imposition of sanctions may be the way to properly implement compliance with the clear policy of the statute.

In *Congregation of the Holy Family v. Mickey Construction Co.*,[57] the court was asked to vacate an arbitration award because the arbitrator had permitted the dilatory filing of a counterclaim, refused to hear testimony of an important witness, and made prejudicial comments during the proceedings such as calling one of the witnesses "an old fogey." The court's authority to consider such improper procedures was challenged based on the absence of any specific provision in the Louisiana arbitration statute. The trial court, affirmed by the court of appeal, vacated the award finding that the procedures of the arbitrator amounted to "misbehavior." In support of its decision, the court of appeal quoted Civil Code article 3112 to the effect that in arbitration the parties "must make known their claims, and prove them in the same manner as a court of justice."[58] While it appears from the facts recited in the opinion that the court was justified in finding that the procedures of the arbitrator amounted to "misbehavior," its reference to article 3112 should not be construed to mean that judicial determination of "misbehavior" is measured by strict compliance with judicial procedure. There is no requirement under Louisiana law that arbitrators have legal training or that judicial procedures be strictly followed. To properly implement the arbitration statute, courts cannot vacate arbitration awards solely because of non-

56. 482 So. 2d 958 (La. App. 3d Cir. 1986).
57. 500 So. 2d 802 (La. App. 1st Cir. 1986).
58. Id at 804.

compliance with judicial procedure.[59] If arbitrators are not the final judge of their own proceedings, they become nothing more than an added and unnecessary step in the course of litigation.

In *Standard Coffee Serv. Co. v. Preis*,[60] an employee and his employer submitted to arbitration their dispute over the validity of an employment contract providing restrictions on the employee's post-employment right to solicit and/or sell products to the employer's customers. The arbitration award held the contract to be a nonsolicitation provision enforceable as a matter of Louisiana law. The employee requested the court to vacate the award on the basis that the arbitrators had erred in not finding the contractual provision to be a post-employment noncompetition restriction unenforceable under Louisiana law. The court of appeal, while acknowledging that it had no specific statutory authority to vacate the arbitration award on such grounds, nevertheless assumed such inherent authority because the contractual provision was void as a matter of Louisiana law. The court emphasized that restrictions on a court's authority to review a request to vacate an arbitration award based on factual and legal errors in an arbitrator's interpretation of a contract did not prevent it from denying enforcement of an arbitration award upholding a void contract. This result appears correct and is consistent with decisions in other jurisdictions.[61]

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59. There is no legal restriction which prevents parties to arbitration from agreeing to be bound by judicial procedures. Housing Auth. v. Henry Ericsson Co., 2 So. 2d 195, 201 (La. 1941).

60. 499 So. 2d 1314 (La. App. 4th Cir. 1986).

61. 5 Am. Jur. 2d § 168; Garrity v. Lyle Stuart, Inc., 386 N.Y.S. 2d 831, 353 N. E. 2d 793 (1976).